STEPHEN J. FIELD AND THE HEADNOTE TO O'NEIL v. VERMONT: A SNAPSHOT OF THE FULLER COURT AT WORK

ALAN F. WESTIN†

LIKE legislative draftsmen, diplomatic negotiators and churchmen convening to reunify Christendom, Justices of the United States Supreme Court appreciate that their communique is likely to be more important than their formal decision. In periods when the Supreme Court is graced with members who know Truth from Error, private papers of the Justices often indicate to historians that the battle over the communique did not always end with the conference debate and the announcement of opinions in open court. One last point being available to challenge the majority text—the printing of the opinions in the *United States Reports*—several notable forays have taken place at this stage of the judicial process. Probably the most extended campaign of this nature occurred in 1892, and, as students of the Court might guess on noting the date, the complainant in this affair was the powerful, irascible and irrepressible Stephen J. Field.

At its 1892 Term, the United States Supreme Court dismissed, for want of jurisdiction, the appeal of a New York liquor dealer convicted in Vermont under the state prohibition law for shipping jugs of whiskey to mail-order purchasers.[1] Publication of the decision in newspapers and legal magazines set off a flurry of shocked commentary in law journals. "[P]urely technical," the *Central Law Journal* announced, "a striking illustration of the wrong frequently perpetrated by courts, in the eager search after proper procedure."[2] A "monstrous perversion of justice," the *Albany Law Journal* concluded,[3] a critique which was taken up by such leading legal commentators as George Wharton Pepper[4] and Joel P. Bishop.[5] Speaking for "American lawyers," one correspondent in the *American Law Review* predicted that when members of the profession read the opinions in the *O'Neil* case and realized how American liberties were imperiled by such "revolutionary ideas promulgated by the highest judicial tribunal of the land," public reaction would soon reverse the unjust decision.[6]

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1. O'Neil v. Vermont, 144 U.S. 323 (1892).
2. 35 CENT. L.J. 1 (1892). A defense of the majority decision was made by a correspondent, *id.* at 152-53, with a reply from the editors defending their position, *id.* at 141.
3. 45 ALBANY L.J. 391, 392 (1892).
4. Pepper, *Editorial Notes*, 40 AMER. L. REG. & REV. 612-18 (1892).
5. Quoted in *Comments on Recent Decisions*, 40 AMER. L. REG. & REV. 620-23 (1892).
6. 40 AMER. L. REG. & REV. 619, 623 (1892).

The object of this solicitude, John O'Neil, owned a liquor store at Whitehall, New York, about twenty miles west of Vermont at one end of Lake Champlain. Beginning in the 1870's, when Vermont enacted a prohibition law, O'Neil began delivering small jugs of whiskey to the local office of the National Express Company for C.O.D. shipment. The purchase price was collected in Vermont from the mail-order customers. In 1882, O'Neil was arrested and convicted before a justice of the peace in Rutland, Vermont for violation of the prohibition law. Since he had been convicted of the same offense in 1879, he was treated as a second offender on 457 violations and sentenced to one month at hard labor, $9,140 in fines and $472.96 in costs. If he could not pay the sums assessed, O'Neil was to serve 28,836 days at hard labor—a term of seventy-eight years.[7]

In a jury trial in Rutland county court, O'Neil pleaded not guilty and requested the court to charge that his actions were not a crime under Vermont law. The court charged, instead, that if the facts as stipulated were believed, O'Neil should be found guilty. O'Neil was convicted, this time of only 307 second offenses, and he was fined $6,140 and $497.96 costs. Computed by Vermont standards, failure to pay the fine would entail 19,914 days, or fifty-four years, at hard labor.[8]

O'Neil's case reached the Vermont supreme court in 1885 and was heard along with *State v. Sixty-eight Jugs of Intoxicating Liquor*,[9] a seizure of O'Neil's jugs from the express company office in Vermont. O'Neil's counsel based his appeal on three points: that the sales, even though C.O.D. transactions, were completed in New York; that Vermont "cannot prohibit or regulate interstate commerce"; and that the Vermont assessment of three days imprisonment for each unpaid dollar "is repugnant to art. 8, U.S. Constitution, and chap. 2, s. 32, Vt. Constitution, in that it allows 'cruel and unusual punishment.' "[10] Similar arguments were made by the express company.[11]

Both O'Neil's conviction and the seizure action were upheld in a single opinion. Divided into five numbered sections, the opinion ruled, in part one, that only a "completed executory *contract* of sale" took place in New York and "the completed *sale* was, or was to be" in Vermont.[12] Therefore, the Vermont prohibition law was violated. Secondly, the court upheld the validity of the seizure from the express company even though a judicial warrant had not been secured. Thirdly, it ruled on the commerce clause issue:

> "III. Concerning the claim that sec. 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the states, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express com-

7. 144 U.S. at 325-27.
8. *Id.* at 327, 330.
9. 58 Vt. 140, 2 Atl. 586 (1885).
10. *Id.* at 150-51.
11. *Id.* at 151-54.
12. *Id.* at 160, 2 Atl. at 590.

> pany, or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure for the protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession within this State clothing infected with the small-pox or yellow fever, or tools with which it was intended to commit a burglary, the State government should be powerless to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought in the ordinary course of business from another State. If the express company has in possession within the State liquor, *with intent to make unlawful use or disposition of it*, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to State laws and police regulations, and to override and defy them under the shield of the Federal Constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the states to regulate the traffic in intoxicating liquors has been settled by the United States Supreme Court in the License Cases, 5 How. 577."[13]

Fourth, the court upheld the admission in evidence of O'Neil's prior conviction and, finally, it declared the treatment of O'Neil not to represent cruel and unusual punishment: the number of offenses penalized, the court said, was simply commensurate with the number of crimes O'Neil had committed. On these grounds, the Vermont court concluded, "the respondent [O'Neil] takes nothing by his exceptions; and in the cases of the *State v. Intoxicating Liquor*, National Express Company, claimant, numbers 25 and 26, the judgments are affirmed."[14]

The Vermont supreme court's decision came down in 1885, just as a group of cases involving state regulation of liquor began to reach the United States Supreme Court. The earlier *License Cases* had set the general rule that a state might require licenses from persons who sold liquor within its borders even though the liquor was imported from other states and sold in the original package.[15]

This was the rule when the liquor prohibition movement spread through the states during the 1870's and 1880's. In 1887, the Supreme Court held that a state could, in the exercise of its police power, prohibit the manufacture and sale of intoxicating liquor within its borders.[16] In 1888, however, the Court held that the prohibition states could not prevent importation of liquor from other states, since such action would be a local regulation of interstate commerce, for which a national rule was required.[17] Two years later, this decision

13. *Id.* at 163-64, 2 Atl. at 592.

14. *Id.* at 166, 2 Atl. at 593.

15. Pierce v. New Hampshire, 46 U.S. (5 How.) 590 (1847). See also Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

16. Mugler v. Kansas, 123 U.S. 623 (1887).

17. Bowman v. Chicago & N. Ry., 125 U.S. 465 (1888).

was applied to forbid punishment for sales made in prohibition states of liquor imported and sold in the original container.[18]

Congress, feeling the pressure of prohibitionist anger at these rulings, passed the Wilson Act in 1890,[19] which declared that liquor transported in interstate commerce, when it arrived in a state, would be subject to local regulation as though it had been produced there, whether or not it remained in the original package. The constitutionality of the Wilson Act was upheld in 1891,[20] but the status of state prohibition laws and interstate commerce was left hanging between the rule of the *License Cases*-Wilson Act and the decisions of 1887 to 1890.

John O'Neil's appeal was presented to the Supreme Court during the 1889 Term, at the height of the liquor regulation controversy, and was decided in 1892. His counsel, abandoning the issue earlier raised under the Eighth Amendment, argued the interstate commerce issue as the sole ground for jurisdiction and reversal. Justice Samuel Blatchford, for a six-man majority, declared that the issue of cruel and unusual punishment had not been assigned as error in the Supreme Court of the United States and thus was not presented for determination. On the commerce clause issue, he said:

> "No point on the commerce clause of the Constitution of the United States was taken in the county court, in regard to the present case, or considered by the Supreme Court of Vermont. . . . The only points raised in the county court, according to the exceptions, were, that the facts set forth in the written admission of O'Neil did not constitute an offense against the statute of Vermont under the complaint, and that he ought to be found not guilty under the facts as set forth. The matters thus excepted to were too general to call the attention of the state court to the commerce clause of the Constitution, or to any right claimed under it."[21]

Blatchford speculated that the failure to set up a commerce clause objection might have been due to the fact that the *Bowman* and *Leisy* doctrines had not yet been formulated. He went on to cite six Supreme Court cases holding that federal jurisdiction would not arise unless the error assigned had been raised at the proper stage of the state proceedings and had been decided by the state court to which the writ of error was directed. Pointing out that Vermont practice required that "the very error relied on must appear affirmatively in the exceptions," the Court concluded that the commerce clause question had not been passed upon by the Vermont supreme court. An adequate nonfederal ground for the Vermont decision existed, the Court added, in the ruling that the sale was completed in Vermont, not in New York.

Justice Field, in a dissent more than twice the length of the majority opinion,[22] declared that the sentence of fifty-four years at hard labor was cruel

18. Leisy v. Hardin, 135 U.S. 100 (1890).
19. 26 STAT. 313 (1890), 27 U.S.C. § 121 (1952).
20. *In re* Rahrer, 140 U.S. 545 (1891).
21. 144 U.S. at 335.
22. *Id.* at 337.

and unusual punishment, forbidden to the states by the Eighth Amendment as incorporated in the Fourteenth Amendment; that the "loose form of accusation" which permitted the trial of a multitude of cases "under an imperfect description of one" did not provide due process of law; and that O'Neil's conviction had been an unconstitutional regulation of interstate commerce by Vermont. Quoting O'Neil's argument in the Vermont supreme court on the commerce clause and the paragraph of that court's opinion discussing the commerce issue, Field concluded that the issue had been considered and that the United States Supreme Court accordingly had jurisdiction. With jurisdiction on the commerce ground, the Court should have examined the whole record and passed on the due process and cruel and unusual punishment points as well.

Justice John Marshall Harlan, joined "in the main" by Justice David J. Brewer, adopted Field's position on jurisdiction.[23] On the merits of the commerce issue, however, Justice Harlan would not have denied Vermont's right to convict O'Neil, since the latter had employed "a mere device to evade the statutes enacted by Vermont for the purpose of protecting its people against the evils confessedly resulting from the sale of intoxicating liquors."[24] But Harlan would have reversed O'Neil's conviction on the ground that the sentence constituted cruel and unusual punishment.

The opinions in *O'Neil* were delivered on April 4, 1892, and were given to the Reporter, John Chandler Bancroft Davis. When the opinions were set into printer's proofs, and Justice Field saw the headnotes prepared by the Reporter, he wrote Davis at once.[25]

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C., *May* 17, 1892

Hon. J. C. BANCROFT DAVIS.

Dear Sir: In looking over the report of the case of *O'Neil v. Vermont*, in Volume 144, I notice this as the 5th head-note:

"No point on the commerce clause of the Constitution of the United States was taken in the county court in regard to the present case, or considered by the Supreme Court of Vermont, or *called to its attention.*"

The last four words do not state the fact. Such point was called to the attention of the Supreme Court of Vermont. It was one of the points in the brief of the counsel for the plaintiff in error there, and was considered in the opinion of the Supreme Court of Vermont itself, as appears by the report of the case in the 58th volume of its reports.

If this 5th head-note is allowed to remain in its present form, I shall, at the first opportunity, take the liberty of declaring it to be an incorrect

23. *Id.* at 366, 371.

24. *Id.* at 369.

25. The correspondence reprinted in the text is from the private papers of the first Justice John Marshall Harlan presently in the author's possession for the purpose of preparing a biography. I am indebted to the present Justice John Marshall Harlan for making the papers available to me.

statement. Indeed, the whole syllabus appears to me to be a most extraordinary one.

I have no objection that you should show this letter to Justice Blatchford, or to any other Justice of the Court.

I am, very respectfully, yours,

STEPHEN J. FIELD

Davis was Reporter in the days when the post was filled by men who had already had distinguished public careers. Born in Massachusetts in 1822, Davis had practiced in New York, served as Assistant Secretary of State of the United States, American representative at the Alabama claims negotiation, Minister to Germany and Judge of the United States Court of Claims. He had been Reporter since 1883. His reply to the Field letter was as follows:

1621 H STREET
WASHINGTON, *May* 18, 1892

The Honorable STEPHEN J. FIELD,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

SIR: I have the honor to acknowledge the receipt of your letter of the 17th inst., criticising the head-notes in *O'Neil v. Vermont*, and informing me that you "shall, at the first opportunity, take the liberty of declaring" the fifth paragraph "to be an incorrect statement."

In reply, I have to say that I have sent a copy of your letter to the Chief Justice, with a note from myself, of which I enclose a copy. Meanwhile I permit myself to add that the Court, in its opinion, said on page 335: "No point on the commerce clause of the Constitution of the United States was taken in the county court in regard to the present case, or considered by the Supreme Court of Vermont." "The matters excepted to were too general to call the attention of the State court to the commerce clause of the Constitution."

I have the honor to be,

Very respectfully, your obedient servant,

J. C. BANCROFT DAVIS,
REPORTER

In his letter to the Chief Justice, Davis stated:

1621 H STREET
WASHINGTON, *May* 18, 1892

MY DEAR CHIEF JUSTICE:

I enclose copies of a letter just received from Mr. Justice Field, and of my reply.

The report of the case of *O'Neil v. Vermont* has been in the hands of the Judges for a week past. As yet I have heard from no member of the Court, who participated in the opinion and judgment, any complaint as to the head-notes.

If the four words objected to are an incorrect statement I shall be pleased to have a suggestion to that effect from you.

Very truly yours,

J. C. B. DAVIS

The Chief Justice of the United States.

Fuller was quick to sustain the Reporter's position and to indicate his regret at Field's explosion.

WASHINGTON, *May* 18, 1892

MY DEAR MR. JUSTICE FIELD:

Mr. Davis has sent me a copy of your note to him of the 17th, and you must allow me to say that it greatly surprises and pains me.

The head-note numbered 5 expresses the facts as I understand and have always understood the record in *O'Neil v. Vermont* in this Court. In your vigorous and eloquent dissent you arrive at a different conclusion upon this point; but inasmuch as the head-note accords with the opinion of the majority in that regard, I do not see how it can be changed on the ground of being incorrect.

It seems to me impossible for any misapprehension to arise on the part of any reader of both opinions, and I extremely regret if you think otherwise.

Very sincerely and truly yours,

MELVILLE W. FULLER

To reassure himself, Fuller wrote a note to Justice Horace Gray, the acknowledged legal historian on the Court and a former Reporter of the Supreme Judicial Court of Massachusetts. "As to the Reporter's head-note in O'Neil v. Vermont," Gray replied, "I unhesitatingly concur with you on both points: 1. It accords with the opinion of the court. 2. That is the whole office of a head-note."[26]

Ordinarily, even with the impassioned and persistent Stephen J. Field, this would have been the close of the issue. Many times previously, Field had written to the Reporter advising Davis that a particular headnote was "singularly defective"[27] or "too broad"[28] and had made suggestions for its rectification. Usually these letters would close on a mild and friendly note. After stating the mistakes, Field would write, "I throw out these suggestions for what they are worth. I am afraid you will think me a fault finder."[29] Or, he would enclose

26. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, 171 (1950). Gray and Davis, out of a common experience as Reporters and Gray's love of minutiae, were close friends and kept up a steady and warm correspondence. See letters from Gray to Davis, Jan. 22, April 24, June 14, Oct. 26, 1888, Feb. 25, 27, 1889, *J. C. Bancroft Davis Papers*, Manuscript Division, Library of Congress, Washington, D.C. (hereinafter cited as *Davis Papers*). Typical of Gray's short notes was the following: "Harlan and Gray J.J. have together concocted a title for the case just disposed of by Field J. (in case you long to imitate the Reporter Wallace) e.g.—'The-Hogs-Killed-by-neglect-of-a-railroad-to-fence-its-track case.'" Gray to Davis, undated, probably Oct. 1888, *ibid.*

27. Field to Davis, May 30, 1885, *ibid.*

28. Field to Davis, June 6, 1885, *ibid.* Where the opinion was Field's, Davis made the corrections as indicated. In one case he commented, "I am disappointed that you are displeased at my syllabus. I thought the opinion a capital one and took some pains to extract from it what I thought was its essence." Davis to Field, undated draft, probably June 7, 1885, *ibid.*

29. Field to Davis, May 30, 1885, *ibid.*

a headnote he had written himself with the observation: "Of course, it is only suggestive to you. You will alter, add to it, or take from it as you like."[30] In fact, only a month previously, Field had exchanged letters with Davis on the same issue as was involved in the *O'Neil* case, the right of a dissenting Justice to challenge a headnote which incorporated the facts and law as declared by the majority. On April 9, 1892, referring to *Iron Silver Mining Co. v. Mike and Starr Gold and Silver Mining Co.*,[31] a Colorado mine claim case, Field had written to Davis:

> "In the syllabus, 2nd head, you state: 'The defendant, to maintain its claim, offered the testimony of several witnesses, which established beyond any doubt' etc. Among those things established is, that in running a tunnel, the parties intersected and crossed three veins. The impression is thus created that those three veins were of gold or silver. If you will turn to my dissenting opinion . . . you will see that I state that they were only veins of decomposed porphyry . . . and that an erroneous impression was created by the opinion of the Court. In support of this position of mine I cited the substance of all the testimony on the subject . . . . I think, therefore, that your statement should have been, not that such matters were established beyond any doubt, but that there was evidence tending to establish certain things upon which, on the assumption that they were established, the Court held certain matters."[32]

Field added that the doctrines of the majority would not be accepted as correct, that he had already received "a very strong criticism" of the majority opinion from the *Engineering and Mining Journal*, and that it was therefore essential that "the statement of facts should not go beyond those that were actually established."

Davis replied by sending Field a page of the majority opinion to show that "the statement objected to was not the reporter's conclusion as to the effect of evidence, but the judgment of the Court." Davis added, "I was aware that there was a great difference of opinion between the majority and the minority on this point; but I thought that the synopsis of the opinion in the syllabus should follow the opinion of the Court on the disputed point."[33]

The issue seems to have been settled with a change in the headnote along the line Field had suggested. As it finally appeared, the point read: "The defendant, to maintain its claim, offered the testimony of several witnesses, which this court holds to establish that . . . ."[34]

No such agreement was to prevail in the *O'Neil* case. Three weeks before the dispatch of Field's first letter protesting the *O'Neil* headnote, Gray had observed to Chief Justice Fuller that "[Field] seems this term to be behaving

30. Field to Davis, Dec. 28, 1891, *ibid.* See also Field to Davis, Feb. 6, May 10, 13, 23, 25, 1889, Oct. 10, 1891, *ibid.*

31. 143 U.S. 394 (1892).

32. Field to Davis, April 9, 1892, *Davis Papers.*

33. Davis to Field, April 10, 1892, *ibid.*

34. 143 U.S. at 394.

more like a wild bull than before."[35] If refusal to drop the *O'Neil* issue constituted evidence of wildness, Field lent support to Gray's observation with two further letters which he dispatched on May 19th.

WASHINGTON, D.C., *May* 19, 1892

DEAR MR. DAVIS:

I have received your answer to my note calling your attention to an incorrect statement as to a matter of fact in the fifth head-note of the syllabus to the case of *O'Neil v. Vermont.* In your answer you quote that note, except the words to which I object, and then cite language of the opinion of the majority to show that the rest of the head-note is in substantial conformity with it. This is not meeting but evading my objection.

I do not understand how any one desirous of correctly reporting a case can consent to put into a head-note an erroneous statement as to a matter of fact—a statement which is perfectly demonstrable to be erroneous, from the briefs of counsel in the case in the Supreme Court of Vermont and from the citations in the opinion of that court made in the dissenting opinions.

I have also received a letter from Mr. Chief Justice Fuller, prompted by your letter to him. I enclose a copy of my answer to that letter, which will also serve as an answer to yours. His opinion can no more than your own make an erroneous statement as to a matter of fact a correct one.

If the fifth head-note is not corrected as I have asked it to be, I shall make the fact public that the note is an incorrect statement of a fact in the case, and I shall publish this correspondence with you to show that I have not neglected to call your attention to the misstatement.

I am very truly yours,

STEPHEN J. FIELD

J. C. BANCROFT DAVIS, Esq.

WASHINGTON, D.C., *May* 19, 1892

DEAR MR. CHIEF JUSTICE FULLER:

Your letter of yesterday's date, respecting the syllabus to the decision in *O'Neil v. Vermont,* is received. If my note to the Reporter surprises and pains you, I regret it, but cannot help it. The syllabus is incorrect, and the statement that no point on the commerce clause of the Constitution was called to the attention of the Supreme Court of Vermont is not correct, and no repetition of it will make it so. The report of the case in the Vermont Reports contains a synopsis of the briefs of counsel before that court, and shows that the point was expressly taken. The extracts of the opinion of that court given in my dissenting opinion show conclusively that the commercial question was before that court, and must have been considered by it or wilfully disregarded. I do not propose to argue the matter with the Justices, nor do I intend to enter into a controversy about it. The record of the case shows the fact to be as I have stated. But whilst I shall at all times be courteous to every one, I shall not refrain from speaking in clear and unmistakable language of what I deem gross wrong and injustice whenever they are seen. The decision in *O'Neil v. Vermont* and the opinion of the court are, in my judgment, destined to an unenviable

35. Gray to Fuller, May 8, 1892, in KING, *op. cit. supra* note 26, at 222.

notoriety, greater than has followed any previous decision of the Supreme Court. The American people are not going to sit quietly and see one of their countrymen condemned to a life of imprisonment at hard labor for engaging in acts of interstate commerce, although the commodities transported were spirituous liquors. Nor will they ever sanction the monstrous doctrine that under an accusation for a single offence a man may be tried for an infinite number of offences, and sentenced to an imprisonment of indefinite duration.

The decision and opinion are now attracting the wide attention of judges and members of the profession of the country. If my associates who concurred in that decision and opinion could read some of the letters I have received on the subject from distinguished judges, lawyers and legal writers, they would find that I am not alone in my views, but that they are held by some of the ablest intellects of the country. I should have shown some of these letters to my associates had I not feared that they would consider that I intended to be rude to them, so I have refrained. I have selected one of the most moderate in expressions of all of them, from the distinguished writer on criminal law, Joel P. Bishop, Esq., and send a copy of it for your perusal.

I am, very respectfully, yours,

STEPHEN J. FIELD

To the Honorable the Chief Justice of the United States.

Davis replied the following day, attempting to draw the discussion to a close as gracefully as possible.

1621 H STREET
WASHINGTON, *May* 20, 1892

DEAR MR. JUSTICE FIELD:

The Chief Justice writes me as follows respecting the O'Neil head-note: "The head-note is exactly right according to the record. It is the very point itself on that branch of the case."

If you think our correspondence on this subject is important enough to make public, I must ask you to let this note appear in it.

Let me, in closing, say that this head-note, after a brief statement of facts, states nine propositions—not as facts condensed by the Reporter—but as propositions of law and fact decided and "held" by the Court.

The fifth proposition follows closely the language of the Court on page 335. Touching the four words to which you object, they purport to state a conclusion of law by the Court that no point on the commerce clause was called to the attention of the State court. In the opinion of this Court it is stated that the only matters excepted to in the trial court were "too general to call the attention of the State court to the commerce clause of the Constitution, or to any right claimed under it." If I understand the use of language, this was deciding, as matter of law, that the attention of the State court was not called to these points, and justifies the statement that that was one of the points *"held"* by the Court.

At any rate, whether this be so or not, the head-note is now sustained as accurate and exact by the Chief Justice, after his attention had been called to your complaint. Therefore I think I am entitled to hold myself free from any charge of evasion or incorrectness on this point.

Whether the majority of the Court were right or wrong in thus holding, is not for me to determine. My duty is to record their decision, and

rest there. Having done this correctly, I must respectfully decline to change it.

Very truly yours,

J. C. BANCROFT DAVIS

MR. JUSTICE FIELD, etc., etc., etc., etc.

Field had no intention of dropping the dispute at such a point, and the daily missives continued.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C., *May* 21, 1892

HON. J. C. BANCROFT DAVIS:

Dear Sir: Your letter of yesterday is received. You quote from a letter of the Chief Justice, in which he says that the O'Neil head-note—referring to the one of which I complained—"is exactly right according to the record. It is the very point itself on that branch of the case." By this I understand that it means that the statement in the head-note, that the commerce clause of the Constitution was not called to the attention of the Supreme Court of Vermont, is correct. The Chief Justice is mistaken. You say, if I understand you, that you will not correct that statement. How can you leave it uncorrected when you know that the report of the case in the Supreme Court of Vermont was before our Court, referred to in the opinions both of the majority and of the dissenting Justices, and that that report is accompanied with a synopsis of the brief of counsel who argued the case for O'Neil, and in that brief the point on the commerce clause is expressly taken? See Justice Harlan's opinion, page 367. The same thing is substantially stated in my dissenting opinion, page 350.

The statement of all the Justices of the Supreme Court, that the point was not called to the attention of the Supreme Court of Vermont, would not be true in the face of that brief presented to that court, nor would the statement be true in the face of the language of the Vermont court itself, in its opinion.

If you choose to make a statement which, in the face of that brief presented to that court, referred to by Justices of this Court in their opinions, and in the face of the opinion of the Supreme Court of Vermont itself, is incorrect, you must bear the burden of the responsibility, and cannot throw it upon the Justices of the Court. They may announce the law as they determine it, but to change the facts is a thing beyond their might. The case of *O'Neil v. Vermont* is destined to an unenviable notoriety, and when it becomes, as it certainly will, a matter of criticism, the erroneous statement of facts in the syllabus of the Reporter will receive consideration.

Very truly yours,

STEPHEN J. FIELD

Davis was not to be frightened off his ground. He responded:

1621 H STREET

WASHINGTON, *May* 22, 1892

MY DEAR JUDGE FIELD:

I have to acknowledge the receipt of your note of the 21st instant.

The question we are discussing seems to have come down to this: Is a statement in a head-note of a point decided by the Court, certified by the

Chief Justice on behalf of the Court to be entirely correct, to be treated as an independent statement of facts by the Reporter, which a dissenting Justice has a right to require to be expurgated from the syllabus?

I am afraid that we shall have to agree to differ, in answering this question.

Very truly yours,

J. C. BANCROFT DAVIS

Mr. Justice FIELD, etc., etc., etc., etc.

The Chief Justice reassured Davis, in a letter on the 23d, that the position he had adopted was the correct one.

WASHINGTON, D.C., *May* 23, 1892

DEAR MR. DAVIS:

As I wrote you the other day, paragraph 5 of the head-note in *O'Neil v. Vermont* expresses the ruling of the Court on that branch of the case, and is, therefore, correct.

Although the correctness of a head-note depends upon what is held in the opinion, and not upon whether the opinion is right or wrong, perhaps I ought to have added that in my judgment it unquestionably does not appear from the record of the court below in this case as transmitted to us, and upon which we proceed in the exercise of our jurisdiction under § 709 R.S., that the attention of the State court was called to the commerce clause of the Constitution or to any right claimed under it.

As to the opinion of the Supreme Court of Vermont, it is to be observed that the writ of error bears date July 12, the citation was served September 2, and the record was filed in this Court, October 11, 1886. The opinion was not sent up with the record, but was certified to by the Chief Justice of Vermont, October 22, 1889, and attached to one of the briefs of counsel. The Chief Justice certified, among other things, "that the law of Vermont does not require it to be prepared by one of the Judges and to be furnished the reporter, and that the opinion in this cause was not so furnished until after the writ of error was allowed in favor of *John O'Neil, Plaintiff in Error, v. The State of Vermont*, and the record transmitted to the Supreme Court of the United States."

That opinion discloses, as stated by Mr. Justice Blatchford, that the observation of the Court as to the application of section eight of Article one of the Constitution had no reference to the case brought to this Court, but to other cases considered at the same time.

Very truly yours,

MELVILLE W. FULLER

Hon. J. C. BANCROFT DAVIS, Reporter.

Here, in late May, the correspondence ended temporarily. To gain factual support for his view, Field wrote off to Vermont for a copy of O'Neil's brief in the state supreme court. In Washington, Field tried to persuade other members of the Court to join in his attack on the headnote, particularly his fellow dissenters, Harlan and Brewer. In fact, Field had copies of his correspondence with Davis and the Chief Justice printed into a booklet, marked "Confidential," and distributed to his colleagues.

Harlan was the foremost object of Field's efforts. Earlier, during the winter of 1892, Field had altered his opinion to include a line of argument which Harlan had advanced in conference, but which Field had not adopted at the time. Writing on February 25th, Field told Harlan:

> "I have made certain alterations in my opinion in the Vermont case and, among others, stating that security against cruel and unusual punishments is the right of every citizen of the United States, and that no State can make or enforce any law which denies or abridges it. This is a step in the direction that you, I think, will approve."[36]

Because of disagreement over the merits of the commerce clause issue, Harlan had not joined the Field opinion but had filed a separate dissent. Knowing Harlan's depth of feeling on the *O'Neil* case, however, and recalling the score of times that he and Harlan had dissented together as two prophets calling down the wrath of heaven on the heresy of their colleagues, Field expected that Harlan would join him on the headnote point. This expectation was strengthened by the opening of Harlan's opinion in *O'Neil*—a protest against the majority's finding that the commerce clause had not been considered in the Vermont supreme court.[37]

Field proved mistaken in his man. Harlan had one quality which was lacking in Field and which distinguished their otherwise similar personalities—a sense of humor. While he could deliver scathing dissents in open court and would be accused of attacking his colleagues with an immoderacy "better suited to a Populist stump speech,"[38] Harlan off the bench was a lighthearted and warm comrade, as likely to make fun of his own dissenting posture as to pass on to the brethren he had just denounced a bottle of Kentucky "Oh-Be-Joyful" or the latest southern anecdote. Perhaps, coming from a border state torn by political fratricide, he had learned the importance of distinguishing principles from personalities. In any event, Harlan composed his dissents and then left the rest to history. Typical of his attitude was a letter written to Chief Justice Morrison Waite during the summer of 1883,[39] just after Harlan and Field had stirred national comment by their dissents in the state bond repudiation cases [40] and Harlan had been the lone dissenter in the *Civil Rights Cases*.[41] Harlan

36. Field to Harlan, Feb. 25, 1892, *Harlan Papers*, University of Louisville Law School, Louisville, Kentucky. This is a smaller collection of Harlan manuscripts. For kindnesses in allowing me to use these, I am indebted to Dean A. C. Russell and Mrs. Pearl Von Allmen, Law Librarian.

37. See 144 U.S. at 366-68.

38. Boston Morning Advertiser, May 22, 1895. The dissent was in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 652 (1895).

39. Harlan to Waite, July 31, 1883, *Waite Papers*, Cincinnati, Ohio (hereinafter cited as *Waite Papers*). I am indebted to Morrison R. Waite, Esq., for the opportunity to examine these papers.

40. Antoni v. Greenhow, 107 U.S. 769, 784, 801 (1883); Louisiana v. Jumel, 107 U.S. 711, 728, 746 (1883). For an example of press comment, see N.Y. Herald, March 21, 1883, p. 6, col. 2.

41. 109 U.S. 3, 26 (1883).

commented that the Chief Justice would hardly recognize him, sitting in his blue flannel suit and growing tufts of grey chin whiskers, as "the same Judge who last term stood, with Bro. Field, as a sentinel on the watch towers, warning unborn millions against the dangers of state repudiation." Speculating about the vacation whereabouts of the other Justices, Harlan thought Bradley was off "studying the philosophy of the Northern Lights," Gray would be "examining into the precedents on British Columbia," and as to Field, "I suppose he has his face towards the setting sun, wondering, perhaps, whether the Munn case or the eternal principles of right and justice will ultimately prevail." Even toward the Negro rights cases, where he was deeply committed to an egalitarian position which the Court had rejected,[42] Harlan could pass off a rough joke about his views:

> "I am glad to say that the attack of 'dis-sent-ery' of which Bro. Matthews spoke is substantially over. That the attack was, for a time, serious, is due to the *nauseous* character of the medicine which produced it. At the outset the discharges were all highly *colored*, but that feature of the case has substantially disappeared, and the patient feels that he stands on firm ground."[43]

With Harlan unwilling to associate himself with the headnote protest, Field returned to the battle alone. On June 28th, he drafted a new statement to the Chief Justice and circulated copies to the brethren.

> WASHINGTON, D.C., *June* 28, 1892
>
> To the Hon. MELVILLE W. FULLER
> CHIEF JUSTICE OF THE UNITED STATES.
>
> Dear Sir: On the 17th of May last I wrote to Mr. Davis, the Official Reporter of the decisions of the Supreme Court of the United States, calling his attention to an erroneous statement in the 5th head-note of the report of the case of *O'Neil v. Vermont*, ... [In several paragraphs, Justice Field summarized the earlier correspondence.]
>
> Inasmuch as the report of the case in the Supreme Court of Vermont was before our court, referred to in the opinion of the court and in the opinion of the dissenting Justices, and that report is accompanied with a synopsis of the brief of counsel who argued the case of *O'Neil*, and in that brief the point on the commercial clause is expressly taken in his defence—the correctness of the statement of the Reporter depends not upon argument but upon the use of his eyes. The Reporter need only look to the report of the case in 58 Vermont, which was before our court, and which report was prepared under the supervision and direction of the justices of the Vermont Supreme Court, to see that the commercial clause was taken by O'Neil's counsel and called to the attention of that court. That fact cannot be changed by any statement to the contrary, any more than a statement that the sun does not shine can alter the fact.
>
> Since this correspondence I have often wondered how it happened that you, who I know wish in all cases to be correct, could concur in the

42. See Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 *passim* (1957).

43. Harlan to Waite, undated, probably 1883, *Waite Papers*.

erroneous statement. At last I think I have found out the cause of your error, and I do only as I would wish to be done by in calling your attention to what I suppose it to be.

In its opinion the Vermont court said: "Concerning the claim that section 8 of Article 1 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the states, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted;" and our court, after quoting this passage, said: "That this observation had reference solely to the two seizure cases, and not to the present case, is apparent from the fact that the [Vermont] court immediately went on to say: 'If an express company or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such articles should be subject to seizure for the protection of the community.'" But as to the other case, the *O'Neil* case, our court said: "No Federal question was presented for its decision as to this case."

It is very evident that the writer of the opinion was laboring under the misapprehension that the only brief before the Supreme Court of Vermont raising the commercial clause was the one filed in the case against the express companies, the claimants of the liquors seized, and that the justices who concurred with him assumed without examination that he was correct in that particular. The fact, however, was that O'Neil appeared by J. C. Baker, Esq., and the express companies by Messrs. Prout and Walker, and these different counsel filed separate briefs for their respective clients. In the synopsis of the brief of Mr. Baker, for O'Neil, as given by the Vermont court in its report, the commercial clause is cited in defence of O'Neil as follows: "The State cannot prohibit or regulate interstate commerce. (R.R. Co. v. Husen, 95 U.S. 465: 1 Rorer Int. St. L. 309)" I have written to Mr. Baker for a copy of the brief he used on his argument before the Supreme Court of Vermont, and received a copy. That brief is much fuller on the commercial clause than the synopsis given in the report. The eighth point of the brief, referring to the statute of Vermont under which the prosecution was had, is as follows:

"VIII

"If this statute of Vermont prohibits a merchant in New York selling his goods in his store in that State to parties in Vermont, or in sending them by public conveyance into Vermont to his customers in this State, who have ordered them by common carrier, when neither said merchant nor any representative of his, except so far as the common carrier represents him in his public employment, have done anything in Vermont pertaining to the sale of said goods, it is repugnant to that clause of the Constitution of the United States which gives Congress the powers to regulate commerce with foreign nations and among the several States, and with the Indian tribes." (U.S. Constitution, Art. 1, § 8). "Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with a foreign nation. (Railroad Co. v. Husen, 95 U.S. 465)

"The case finds that the respondent has the right to make these sales in Whitehall by law. The purchaser had a right to buy these liquors there and bring them into Vermont for his own use. If they were not to be dis-

posed of in violation of law, any person had a right to bring them to Vermont for him. To make such a lawful sale in New York, criminal as against the laws of Vermont, because the goods are transported by a common carrier across the line into this State for the purchaser, whether a lien for the price is reserved or not, is a regulation of interstate commerce, and as such is within the exclusive jurisdiction of the Federal government. The police power of Vermont does not extend to a prohibition of this commerce, to the extent of punishing a citizen of another State for lawful acts where committed, by reason of their contemplating a transportation here, by means not forbidden to citizens of our own state.

"If this point is ruled against the respondent, he prays for a writ of error to procure a reconsideration of the question before the Supreme Court of the United States."

The court did rule against the position of counsel, and such ruling constitutes one of the assignments of error in this court.

Counsel for the express companies, Messrs. Prout and Walker, took the commercial point as follows: "Congress has exclusive power to regulate commerce among the States. (*Gibbons v. Ogden*, 9 Wheat. 1 (22 U.S. bk. 6, L.ed. 23); *Passenger Cases*, 7 How. 395 (48 U.S. bk. 12, L.ed. 479); *State Freight Tax*, 15 Wall. 232 (82 U.S. bk. 21, L.ed. 146); *Henderson v. Mayor of New York*, 92 U.S. 259; *Chy Lung v. Freeman*, Id. 275; *People v. Compagnie Generale Transatlantique*, 107 U.S. 59.)"

I was satisfied, and in my dissenting opinion I endeavored to demonstrate, that the commercial clause was brought to the attention of the Supreme Court of Vermont for the protection of O'Neil, independently of the fact that the brief in his case demonstrably shows that such was the case; but I also referred to the fact that the report of the case before the Supreme Court of Vermont showed that counsel took the position that the transactions complained of were those of interstate commerce, and that the State could not prohibit or regulate that commerce. (See page 350.) Justice Harlan and Brewer, in their dissenting opinion, also refer to the same fact in the report of the case. (See page 367.) But in vain did I try, though I labored for days, to get the Justices of the court to give their attention to this fact. Therefore I cannot rest until they do see it, and some steps are taken to undo what I deem the wrong that has been inflicted upon the defendant in the affirmance of the monstrous judgment against him. Indeed I should feel myself, to some extent, responsible for that wrong if I were silent in this matter.

I am very respectfully yours,

STEPHEN J. FIELD

P.S.—The above letter was written solely for the Chief Justice, but, as the action of the Reporter in refusing to correct his erroneous statement as to a matter of fact in the head-note to the report of the case of *O'Neil v. Vermont* is of interest to all the Justices, I thought a copy should be sent to each of them, and so I have had the letter printed.

While Justice Field remained a vexation to his colleagues until he was pressured into retirement in 1897,[44] he never went through with the threat to make

44. See KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, 222 (1950); SWISHER, STEPHEN J. FIELD CRAFTSMAN OF THE LAW (1930).

his headnote protest public, and the Reporter printed the headnote as it stood.[45] Still, the ghost of the *O'Neil* case clanked its chains through the corridors of the Court for some time.

For one thing, Field kept hammering away at the idea that the *O'Neil* case violated the doctrine of *Chapman v. Goodnow*,[46] which he insisted had held that an issue "fairly presented by the record" and "actually necessary to the determination of the case" might give rise to federal jurisdiction even though the point had not been discussed by the state supreme court.[47] Actually, *Chapman* had made it clear that the issue must have been properly raised according to state trial practice. Nevertheless, Field used his concurrence in the first income tax case to reiterate his *O'Neil* argument.[48] Arguing that the validity of a tax on state bonds and federal judicial salaries should have been ruled upon by the Court even though counsel had made no attack on these applications of the tax, Field cited his dissent in *O'Neil* and warned that such a rule was essential in order "that the Constitution may not be violated from the carelessness or oversight of counsel in any particular."[49] Unlike his repeated dissents from the *Munn* and *Slaughterhouse* cases, Field's argument against the *O'Neil* precedent never prevailed in his lifetime, or later. As recently as 1943, Chief Justice Harlan Stone ruled: "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it . . . ."[50] The first precedent cited to support this proposition was *O'Neil v. Vermont.*

In one narrow area, Field might have drawn comfort from a later development. In a 1907 case coming from the Philippine supreme court, *Paraiso v.*

45. For a description of how headnotes were handled during the reportership of Davis's successor, see BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 79-81 (1942). The Supreme Court stated in United States v. Detroit Timber and Lumber Co., 200 U.S. 321, 337 (1906), that the headnote is "simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession." A. H. Garland, one of the leaders of the Supreme Court bar in the late nineteenth century and O'Neil's counsel in the Supreme Court, wrote, perhaps with the *O'Neil* incident in mind since he was a close friend of Davis: "The office of the reporter is not a sinecure, nor is it a bed of roses. A failure to give full scope in the syllabus to the opinion to the utterances of a judge, brings wrath upon him . . . ." GARLAND, EXPERIENCE IN THE SUPREME COURT OF THE UNITED STATES 23 (1898). The present Reporter of Decisions, Mr. Walter Wyatt, has written the author: "Our present practice is to submit a draft of the headnote for each case only to the Justice who delivered the opinion of the Court, inviting any suggestions he may wish to make. . . . [W]e usually accept such suggestions, in substance at least." Letter from Walter Wyatt to Alan F. Westin, Nov. 15, 1956, Author's Possession (quoted with permission).

46. 123 U.S. 540 (1887).

47. See Field's discussion in *O'Neil.* 144 U.S. at 358-59.

48. Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 604 (1895).

49. *Ibid.*

50. Yakus v. United States, 321 U.S. 414, 444 (1944). See Flournoy v. Wiener, 321 U.S. 253, 259 (1944).

United States,[51] a municipal employee had been convicted for falsifying documents and was sentenced to a long prison term at "cadena," which entailed wearing heavy chains at the ankles and wrists throughout imprisonment and performing "painful" labor. A Holmes opinion, over a strong Harlan dissent, refused to reach the Eighth Amendment issue of cruel punishment because it had not been assigned below. "We do not feel called upon," Holmes observed, "to consider errors not assigned. See *O'Neil* v. *Vermont* . . . ."[52] Three years later, though, the Court broke with the *Paraiso* approach and in a virtually identical case adopted a position such as Field had advocated. In *Weems v. United States*,[53] the Court held "cadena" to be cruel and unusual punishment forbidden by the Constitution, even though that ground had not been assigned below. Citing Federal Rule Thirty-five, Justice McKenna explained that the Supreme Court had discretion to consider an issue not assigned below where it was considering a criminal case, the question was important and constitutional rights were involved.[54] Since *Weems* involved Supreme Court discretion over cases arising in the "federal channel," however, it was distinguishable from the *O'Neil* situation, which concerned the power of the Court as a matter of federalism to decide questions not raised according to state requirements.

Although later decisions must have been as little comfort to John O'Neil as the *Weems* ruling was to prisoner Paraiso, the Supreme Court did strike down state regulation of interstate C.O.D. liquor sales within a dozen years after the *O'Neil* case. After several rulings chipping away at the position of the prohibition states,[55] the Court met the issue squarely in a 1905 case which closely resembled *O'Neil*.[56] An American Express Company office in Illinois received four boxes of liquor which it carried to C.O.D. purchasers in Iowa, where they were confiscated under Iowa's prohibition law. The Supreme Court invalidated the seizure, ruling that a C.O.D. sale did not constitute a transaction within Iowa so as to render the sale intrastate and subject to Iowa's regulation.

The *O'Neil* affair was Field's next-to-last sustained protest within the Court. The last was his conduct a year after the *O'Neil* incident, in the Chinese Deportation cases, *Fong Yue Ting v. United States*.[57] A congressional act of 1892 had required all alien Chinese laborers in the United States to apply to the Collector of Internal Revenue for a certificate of residence. Anyone not doing so and found in the United States within a year would be arrested, taken

51. 207 U.S. 368 (1907).

52. *Id.* at 372.

53. 217 U.S. 349 (1910).

54. *Id.* at 362.

55. See Vance v. W. A. Vandercook Co., 170 U.S. 438 (1898), upholding the right of a South Carolina citizen to have liquor delivered to him from another state for his own use, despite a state prohibition law, and Norfolk & W. Ry. v. Sims, 191 U.S. 441 (1903), ruling that a Chicago company which shipped a sewing machine C.O.D. to a North Carolina purchaser did not engage in a sale in North Carolina so as to subject the company to a license tax.

56. American Express Co. v. Iowa, 196 U.S. 133 (1905).

57. 149 U.S. 698 (1893).

before a federal judge and ordered deported, unless he established that he had been unable to secure the certificate because of illness or unavoidable cause and proved that he was a resident of the United States in 1892 "by at least one credible white witness." Justice Gray wrote the majority opinion upholding the law as an exercise of the sovereign's right to admit or exclude aliens, which could be conducted without conforming to the procedural due process which might be required if citizens were involved. Chief Justice Fuller, Justice Brewer and Justice Field each filed separate dissents. (Justice Harlan was in Europe as one of the American representatives at the Bering Sea Arbitration and did not participate in the decision.) The dissents were tartly worded; for example, Brewer closed his with the sentence: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?"[58] Field's dissent particularly objected to a sentence in Gray's opinion which had stated: "Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country." Field argued that aliens, once they had acquired residence in this country under a Treaty of Friendship with China, could not be deported without due process. He claimed that Gray's statement would support clear violations of the Fourth and Fifth Amendments and would justify such actions as federal officers setting Chinese deportees adrift in boats without supplies. "I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any proceeding for the enforcement of the laws of the United States."[59]

When Field's dissent was filed for inclusion in the *United States Reports*, Gray was so upset by Field's attack that he took back his majority opinion and modified the sentence quoted by Field.[60] When Field learned of the change, he sent the Reporter a footnote to be added to his dissent, explaining that the sentence attacked had originally been in the opinion but had been withdrawn when criticized.[61] "This ought not to give offense to Mr. Justice Gray," Field wrote the Chief Justice.[62]

Gray was both offended and unnerved. Letters rushed between Gray and the Reporter, in which Gray lamented Field's "scandalous note" and tried to find solace in the fact that "he is responsible, not I, or the Court."[63] Gray was not able to forget the problem, though, and he held repeated conferences with Fuller to find a way of avoiding publication of the footnote.[64] Field was

58. *Id.* at 744.
59. *Id.* at 755-56.
60. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, 186 (1950).
61. Described in Gray to Davis, June 10, 1893, *Davis Papers.*
62. KING, *op. cit. supra* note 60, at 186.
63. Gray to Davis, June 10, 14, 17, 1893, *Davis Papers.*
64. KING, *op. cit. supra* note 60, at 186.

adamant, and this time his own opinion, not a headnote, was involved. In the end, Gray was persuaded to restore the sentence, and he so informed the Reporter.[65] On June 22d, Field wrote a satisfied little letter to the Reporter which acknowledged that the sentence had been replaced and instructed that his footnote be struck.[66]

Field was far from satisfied with the merits of the decision, though, and he embarked on a campaign to get it reversed—this time by an effort directed outside the Court. In a remarkable letter to a fellow democrat in the Cleveland administration, Attorney General Don M. Dickenson, Field urged that a bill for rehearing the case be introduced in Congress, an action which he defended as within congressional power. Field had other suggestions, too, one of which might have made a handy footnote to Mr. Roosevelt's brief in 1937:

> "I have been hoping that I should meet you before leaving Washington, for I wanted to talk to you in reference to the decision of the Chinese-Deportation cases. That decision has affected me very unpleasantly. The great doctrines which are embodied in the Constitutional Amendments obtained their recognition in England only after centuries of severe struggle between the People and the Crown; and as Secretary [of State Walter Q.] Gresham remarked to me a day or two since, every line of those Amendments had been obtained by a bloody contest. I am not willing that any one of them should be given up; nor am I willing to have it held that Congress has the power to suspend their guaranty and security with reference to any person who is a subject of a country at peace with us and who is a resident in our country by our consent.
>
> "How then are we to have this decision remedied? I feel quite confident that if the case were up again before a full court, the decision would be different. I want to get it up before a full court. Judge Harlan will be back at the next term [from Europe], and he is very much exercised, I am glad, over the decision. The matter is of too great importance to be allowed to rest undisturbed. A new case can undoubtedly be brought up, and there will be, it is to be hoped, a change in some members of the Court. Judge Blatchford's health is very much broken, and I might, I think, use stronger language in regard to it. I think he will give way. Brown, whom I regard as the weakest of all the Judges, is too strong physically to have any hope of a vacancy by resignation from him. But, considering the failing health of Blatchford and the weakness of Brown, and also the necessities for more judicial force at the west and south, where new circuits should be created, there might possibly be an increase in the bench. As a general rule, it would be dangerous to increase the bench for the purpose of correcting a bad decision, but where that decision goes to the very essentials of Constitutional Government, the question of an increase of the bench may properly be considered and acted upon. Surely the American people are not to submit to such a doctrine as has been announced in this case—which is nothing else than that the Safeguards of the Constitution for life, liberty and property can be suspended by Congress, with reference to any class, at its pleasure."[67]

65. Gray to Davis, June 14, 1893, *Davis Papers.*

66. Field to Davis, June 22, 1893, *ibid.*

67. Field to Dickenson, June 17, 1893, *Dickenson Papers,* Manuscript Division, Library of Congress, Washington, D.C.

Field kept at Dickenson in an effort to have President Cleveland appoint a successor to Justice Samuel Blatchford—after that Justice's death in the summer of 1893—who would provide a fifth vote for the Field position in the deportation cases, but Field proved as unsuccessful here as in his *O'Neil* foray.[68]

As for John O'Neil, after his case was dismissed by the United States Supreme Court, he filed a motion in arrest of judgment which was overruled at the January 1894 term of the Vermont supreme court. An order was issued on March 1, 1894, which committed him to the House of Correction at Rutland for one month at hard labor and 19,950 additional days if he failed to pay his fine and costs within a month.[69] Since the prison records for the Rutland House of Correction have been destroyed by fire,[70] there is no way of knowing how long he served. In any event, whether he broke Vermont granite for decades or became a pioneer father of California, O'Neil's place in American constitutional history is secure.

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68. Field to Dickenson, June 20, July 13, 16, Aug. 7, 15, 17, 25, 27, Sept. 1, Nov. 14, 1893, *ibid.*

69. Letter from George N. Harman, County Clerk, Rutland, Vt., to Alan F. Westin, Nov. 27, 1956, Author's Possession.

70. Letter from John L. Ferguson, Warden, Vermont State Prison, Windsor, Vt., to Alan F. Westin, Dec. 3, 1956, Author's Possession.